

NTSB Order No. EA-1715

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 5th day of November, 1981

From the above, it is evident that respondent has failed to perfect his appeal, which is therefore subject to dismissal under the Board's Rules of Practice.<sup>2/</sup>

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above order.

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<sup>2/</sup> Section 821.48(a) reads as follows:

"§821.48 Briefs and oral argument.

(a) Appeal briefs. Each appeal must be perfected within 40 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by the filing with the Board and the serving on the other party of a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief."

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Entered: July 17, 1981

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

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:  
J. LYNN HELMS, Administrator, :  
Federal Aviation Administration, :  
Complainant, :  
vs. : DOCKET NO. SE-5203  
PIERRE R. D'AURAY, :  
Respondent. :  
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BEFORE: PATRICK G. GERAGHTY, Administrative Law Judge

FOR COMPLAINANT: Allan H. Horowitz, Esquire  
FOR RESPONDENT: Dennis L. Blewitt, Esquire

PLACE: Denver, Colorado

DATE: Friday, July 17, 1981

## ORAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, and the Board's Rules of Practice in air safety proceedings on the appeal of Pierre R. D'Auray, hereinafter referred to as Respondent, from an Order of Revocation which seeks to revoke his commercial pilot certificate, No. 1963893 with attached ratings and limitations.

The Order of Revocation, as is provided by the Board's rules, serves herein as the complaint and was filed on behalf of

FEDERAL REPORTING SERVICE INC.  
DENVER, COLORADO

1 the Administrator of the Federal Aviation Administration,  
2 herein the Complainant, through his Regional Counsel of the  
3 Rocky Mountain Region, Federal Aviation Administration.

4 The matter has been heard before this Administrative  
5 Law Judge, and as is provided by the Board's Rules of Practice,  
6 I have elected to issue an oral decision in the matter.

7 Following due notice to the parties, this matter came  
8 on for trial on July 17, 1981, in Denver, Colorado. The  
9 Respondent was present at all times and was represented by his  
10 counsel, Dennis L. Blewitt of Boulder, Colorado. The  
11 Complainant was represented by one of his staff counsel,  
12 Allan Horowitz, Esquire, of the Regional Counsel's Office,  
13 Rocky Mountain Region, Federal Aviation Administration.

14 Parties were afforded full opportunity to offer  
15 evidence, to call, examine, and cross-examine witnesses. In  
16 addition, counsel were afforded the opportunity to make oral  
17 argument in support of their respective position and to propose  
18 orally findings of fact and conclusions of law.

19 DISCUSSION

20 As noted above, the Administrator seeks revocation  
21 of the Respondent's commercial pilot certificate. It is  
22 alleged as a ground for that action that the Respondent, by  
23 reason of a conviction in the United States District Court for  
24 the Southern District of California, which occurred on or about  
25 April 28, 1980, thereby being in violation of Section 61.15(c)



1 of the Federal Aviation Regulations.

2 Section 61.15(c) of the Regulation provides that a  
3 conviction specified in Paragraph A of this subpart for the  
4 commission of an act as referenced in Paragraph B will be  
5 considered grounds for either suspending or revoking any  
6 certificate or rating issued under Part 61. Subparagraph A,  
7 as is pertinent here, states that "No person who is convicted  
8 of violating any federal or state statute relating to the  
9 growing, possession, or manufacture, sale, disposition, or  
10 transportation of narcotic drugs, marijuana or other substances,  
11 is eligible for any certificate or rating issued under the  
12 part for a period of one year after the date of final conviction.

13 I will summarize the pertinent evidence in the matter.  
14 That evidence which I do not specifically discuss has been  
15 considered by me, as I have considered all testimony and  
16 documentary evidence. The evidence which I do not discuss has  
17 been viewed by me as either being consistent with the evidence  
18 I do mention or as not materially affecting the outcome of my  
19 decision.

20 The Administrator's first witness was a Robert  
21 Karafa. He was at one time an employee of the Federal Aviation  
22 Administration, and at that point in time was an investigator  
23 within the Civil Aviation Security Division of the Federal  
24 Aviation Administration in the Rocky Mountain Region.

25 In the course of his duties in the Security Division,

1 Mr. Karafa had occasion to investigate certain allegations  
2 which, on his testimony, were brought to the attention of the  
3 Federal Aviation Administration by a letter from one Mr.  
4 Thomas of the United States Probation Office, who is located  
5 in Boulder, Colorado. The letter requested information  
6 concerning the pilot status and certificates of the Respondent.

7 The witness indicated that as a result of that letter  
8 he contacted Mr. Thomas, and to summarize, did obtain a  
9 certified copy and information concerning a conviction which  
10 had occurred on April 28, 1980, in the United States District  
11 Court for the Southern District of California, with respect to  
12 Respondent, in which Respondent entered a guilty plea for the  
13 offense of conspiracy to possess a controlled substance with  
14 intent to distribute, that being in violation of 21 USC 846 and  
15 841(a)(1) of the statutes of the United States.

16 Mr. Thomas also testified on behalf of the Complainant.  
17 Mr. Thomas, as I've already noted, is a probation officer and is  
18 located in Boulder, Colorado. He is the Respondent's current  
19 probation officer. He has been acquainted with the Respondent  
20 since about March of 1980. In connection with his supervision  
21 of the Respondent, he requested Respondent to offer a written  
22 version or to make a statement as to the events leading up to  
23 or surrounding the conviction under which the Respondent was  
24 convicted in the United States District Court, as I've already  
25 mentioned. That statement written by the Respondent is received



1 as Administrator's A-2.

2 Administrator's A-2 is a typewritten letter signed  
3 by the Respondent. The pertinent portions thereof would  
4 indicate that the Respondent, and that is not contradicted by  
5 any other testimony, did operate an aircraft in furtherance of  
6 the conspiracy to import the marijuana into the United States  
7 from Mexico. The letter clearly spells out that the Respondent  
8 was acting as pilot of the aircraft used to import the  
9 marijuana from Mexico to the United States, and that the  
10 Respondent apparently had the right to operate the aircraft  
11 and to divert it or select the various flight paths that the  
12 aircraft operated, as indicated by the statement that the  
13 Respondent elected to divert from the original landing point  
14 to 29 Palms airport, where the arrest occurred.

15 The Respondent, testifying on his own behalf and  
16 in accordance with other testimony from Mr. Thomas, does  
17 establish that he is currently under probation supervision as  
18 a result of his conviction in the United States District Court.  
19 His probation officer, as I've already indicated, is Mr. Thomas.  
20 As part of the terms of the guilty plea and the probation, it is  
21 indicated that the Respondent has surrendered his pilot  
22 certificate to the Probation Department of the United States  
23 Courts and that Respondent has not piloted any aircraft since  
24 about January 16, 1980; which is, of course, in accordance with  
25 the terms of the probation in which the court provides and

1 directs that the Respondent not pilot any aircraft for a period  
2 of two years. It is also not contradicted that the Respondent  
3 has surrendered his pilot certificate to be held by the  
4 Probation Department.

5 The proceeding under Section 609 of the Act requires  
6 that the burden of proof be sustained by the Administrator  
7 with respect to each and every allegation of the complaint.  
8 Based upon my view of the witnesses and their demeanor and  
9 the evidence in its entirety, I am constrained to find that  
10 the clear preponderance of the reliable and probative evidence  
11 does sustain the operative allegations, those contained in  
12 Paragraphs 1 and 2 of the complaint, by a clear preponderance,  
13 and I so hold.

14 I further find that the uncontradicted evidence as  
15 established both by the Respondent's testimony and  
16 Administrator's Exhibit A-2 does demonstrate that the  
17 Respondent in the commission of the offense for which he was  
18 found guilty on his guilty plea did operate an aircraft, that  
19 is, that he was the pilot in command of the aircraft which was  
20 found to be importing the controlled substance, to wit,  
21 marijuana from Mexico to the United States.

22 With respect to the written statement made by the  
23 Respondent, under Board precedent it is quite clear that this  
24 is not a criminal proceeding, it is a civil proceeding. The  
25 Board has held that written statements such as these, either



1 given to investigators of the Federal Aviation Administration  
2 or to other enforcement authorities, unless there is some  
3 showing of an invalid arrest, are receivable in proceedings  
4 before the Board.

5 I might also observe that even if an item of  
6 evidence were illegally obtained, by a state official for  
7 example, it would be admissible either in a federal proceeding  
8 or in a proceeding before the Board. So I see no objection to  
9 the receipt of this document. And I mention that just simply  
10 to complete the record in case there is further action in this  
11 matter.

12 My subsequent observations will also be simply to  
13 complete the record and to amplify those which I have already  
14 ruled upon in prior orders issued in this proceeding.

15 With respect to the matter here, there had been a  
16 motion to strike for reason of stale complaint. The testimony  
17 of Mr. Karafa does indicate that the matter first came to the  
18 attention of the Administrator in August of last year. Under  
19 the Board decision as reviewed by the U. S. Court of Appeals  
20 in the case of Administrator v. Slotten, the Board has held  
21 that if the Administrator acts with reasonable dispatch after  
22 learning of the offense, that satisfies the Rule 33 requirements.  
23 Herein there is no indication but that the Administrator did  
24 act within the six months following first knowledge of this  
25 offense; and even in the recent case of Administrator v.

1 Zanlunghi, I would feel that the Administrator has complied  
2 with the requirements of Rule 33 of the Board's Rules of  
3 Practice.

4 With respect to the argument as constitutionality of  
5 the regulation, I might simply observe that under case law,  
6 that it has been held and ruled by the United States Supreme  
7 Court that a regulatory agency may not question the  
8 constitutionality of the rules and regulations under which it  
9 operates, and that has been held by Board precedent to restrict  
10 the Board from passing upon the constitutionality of the  
11 Federal Aviation Regulations.

12 I might also simply observe to complete the record  
13 that the Board has, in the case of Administrator v. Cable,  
14 2 NTSB 1967 (1975) observed again that it does not have the  
15 authority to pass on constitutionality and, in any event, that  
16 the United States Court of Appeals have ruled upon this  
17 particular regulation and found that the regulation is  
18 constitutional. I refer to the case of Rahm v. NTSB, 52 F.2d  
19 1344, U. S. District Court for the District of Columbia, 1975,  
20 wherein the court held that the particular regulation was valid  
21 under the Constitution.

22 As to whether or not the Respondent is a holder of  
23 an airman certificate, it is not controverted that the  
24 Respondent has surrendered his certificate to the Probation  
25 Department. He is not the possessor of a certificate; that is,



1 he does not have possession. However, he is still the holder  
2 of a certificate within the meaning and intent of the Federal  
3 Aviation Act of 1958 and the Federal Aviation Regulations;  
4 that is, he has had a certificate issued to him by the  
5 Administrator of the Federal Aviation Administration. That  
6 certificate is still outstanding and is a valid certificate,  
7 inasmuch as it has not been surrendered to the Administrator  
8 by the Respondent for cancellation or otherwise acted upon by  
9 the Administrator to void it.

10 The only way the certificate can be voided or  
11 canceled is by action of the Administrator of the Federal  
12 Aviation Administration. Until such action, any airman is  
13 still the holder of the certificate, whether or not he has it  
14 physically in his possession. Therefore, the Respondent is a  
15 holder of a certificate, and as such, is subject to the rules  
16 and regulations of the Administrator, subject to the authority  
17 of the Federal Aviation Administration, subject to the Federal  
18 Aviation Act of 1958, and consequently is subject to the  
19 jurisdiction of the Board as the authority is derived under  
20 the Act.

21 Turning to the sanction in this case, there is a long  
22 line of cases before the Board, starting with the case of Rahm,  
23 proceeding to the case of Administrator v. Amos, 2 NTSB 1305,  
24 a 1975 case, in which the Board has held that where an  
25 individual has been convicted of an offense within the

1 provisions of Section 61.15 and the operation of an aircraft  
2 is involved in that offense, that the appropriate sanction is  
3 revocation.

4 A particular case which I wish to mention is the  
5 case of Administrator v. Williams, EA-1170 (1978). The facts  
6 in that case are somewhat similar to the situation here. In  
7 the Williams case, the respondent therein had been convicted  
8 in the United States District Court for the District of Nevada  
9 for the violation of conspiracy to violate the Import/Export  
10 Act, to wit, import a controlled substance, marijuana. The  
11 sections of the United States Code are the same ones that we're  
12 involved with here.

13 Subsequent to his conviction, Mr. Williams was  
14 incarcerated for approximately a year and a half, at the time  
15 of the hearing was on a five-year probation, had been fined  
16 and was in the process of paying a fine of \$10,000. He had  
17 then been hired by one of the large casinos in Nevada, had  
18 been placed in a position of trust, had a possibility of acting  
19 as a pilot for this organization once he was off probation;  
20 and therein, the initial decision and order was to modify the  
21 Administrator's order of revocation to provide for a suspension  
22 period of approximately 10 or 12 months, based upon the fact  
23 that Mr. Williams had done hard time, was paying a \$10,000 fine,  
24 was on a five-year probation, and apparently had completely  
25 changed his lifestyle.



1           However, on appeal the full Board reversed the  
2           sanction modification and instituted the order of revocation,  
3           and the Board stated therein at Page 5, "As a rationale for  
4           modifying the sanction, the Judge cited a number of factors,  
5           including respondent's prior record as a pilot, violation free  
6           history, substantial penalty received from the court, effort to  
7           redirect lifestyle, \$10,000 fine, and the current position of  
8           trust." The Board stated further that in the Board's judgment  
9           "the above factors were outweighed by the fact that the  
10          respondent had operated an aircraft as pilot and part owner  
11          carrying marijuana on one occasion" and that the Board had  
12          consistently held that such action warrants the sanction of  
13          revocation, citing therein the line of cases to include  
14          Administrator v. Amos, Administrator v. Cable, and Administrator  
15          v. Franklin.

16                I might point out that subsequently, in the case of  
17          Administrator v. Freeze, EA-1274 (1979), the Board affirmed  
18          again the position that violation and conviction of the United  
19          States Code and in violation of Section 61.15 does constitute  
20          ground where aircraft are involved in the offense that the  
21          appropriate sanction before the Board is the imposition of the  
22          sanction of revocation.

23                In line, therefore, with the ample Board precedent,  
24          I am constrained to find herein that regardless of the fact  
25          that the Respondent has surrendered his certificate and is on

1 probation, that the clear facts of a conviction within the  
2 meaning and intent of Section 61.15 of the Regulations and the  
3 use of an aircraft in the commission of the offenses mandates  
4 the imposition of the sanction of revocation, and I so hold.

5 I therefore must find, as I do, that the Administra-  
6 tor's Order of Revocation should be affirmed.

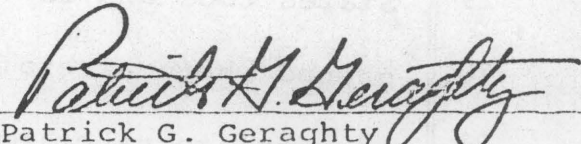
7 IT IS, THEREFORE, ADJUDGED AND ORDERED:

8 1. That the Administrator's Order of Revocation  
9 be, and the same hereby is affirmed as issued.

10 2. That the Administrator's Order of Revocation  
11 shall continue in force and effect for the period of time as  
12 provided in the Order of Revocation.

13 3. That the Respondent shall surrender this  
14 certificate to the Administrator of the Federal Aviation  
15 Administration or an authorized representative thereof for  
16 cancellation.

17 Entered this 17th day of July, 1981, at Denver,  
18 Colorado.

19  
20   
21 Patrick G. Geraghty  
22 Administrative Law Judge

23 APPEAL

24 Either party to this proceeding may appeal from this  
25 decision and order by filing with the Board a Notice of Appeal



1 within ten days after this date. The appeal must be perfected  
2 within forty days subsequent to this date by filing with the  
3 Board a brief in support of that appeal. Appeals may be  
4 dismissed by the Board on its own motion or upon the motion of  
5 the opposing party where the appealing party fails to perfect  
6 the appeal by the timely filing of the brief.

7 The parties' attention is directed to Sections 821.43,  
8 47, and 48 of the Board's Rules of Practice in air safety  
9 proceedings for further information concerning the nature and  
10 content of appeal briefs.

11 An original and four copies of the Notice of Appeal  
12 and supporting brief must be filed with the National  
13 Transportation Safety Board, Docket Section, Waterfront Center,  
14 Suite 301, 1010 Wisconsin Avenue Northwest, Washington, D.C.  
15 20007, with copies served upon the opposing party.

16 The timely filing of an appeal in this matter shall  
17 stay the order contained in this decision; however, if no  
18 appeal is perfected within the time provided, the decision  
19 herein shall become final.

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